

APR 2 1977

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1976

NO. 76-1222

NEW PITTSBURGH COURIER
PUBLISHING COMPANY, *Petitioner*

v.

RICHARD F. JONES, RECEIVER OF PITTSBURGH
LIQUIDATING CORPORATION, *Respondent*

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA**

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QUESTIONS PRESENTED FOR REVIEW

- I. Is an administrative tax sale of a contract right to receive payments of money invalid if the Internal Revenue Service fails to serve the person entitled to receive the payments with the notice of seizure required by Section 6335 of the Internal Revenue Code?
- II. Are the notice provisions of Section 6335 of the Internal Revenue Code mandatory?
- III. Does a person whose contract right to receive payments is wrongfully sold pursuant to an invalid administrative tax sale have a remedy against the purchaser?

STATEMENT OF THE CASE

Respondent is the receiver of Pittsburgh Liquidating Corporation, a Pennsylvania corporation, having been so appointed by order of the Court of Common Pleas of Allegheny County, Pennsylvania. Prior to being named Pittsburgh Liquidating Corporation, the corporation was known as the Pittsburgh Courier Publishing Company (the "Old Courier"). The Old Courier had been engaged in the newspaper publishing business and had published a weekly newspaper known as the "Pittsburgh Courier". In the summer of 1966 the financial condition of the Old Courier was in such a state that its survival was threatened. At that time, Publishers Service Syndicate, Inc. ("Publishers Service") entered into negotiations with the Old Courier with respect to the sale by the Old Courier of its remaining assets, including the use of the Courier name and the good will and circulation of the Old Courier. The negotiations culminated in the execution of an agreement dated October 15, 1966 (the "Agreement") and accompanying documents.

In consideration of the transfer of the assets to Publishers Service by the Old Courier and in accordance with the provisions of the Agreement, Publishers Service organized the Petitioner, the New Pittsburgh Courier Publishing Company. Pursuant to the Agreement, the Petitioner assumed the obligations of

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Publishers Service under the Agreement including the obligation to make certain payments. These payments included payments to be made for a period of ten years following October 15, 1966 (in quarterly installments as earned) in an amount equal to fifty (50%) percent of the net income (as defined in the Agreement) of the Petitioner after payment of all federal, state and city taxes. After the execution of the Agreement, the Old Courier ceased operating and its prior business was conducted by the Petitioner.

Respondent instituted this action in the Court of Common Pleas of Allegheny County, Pennsylvania by filing a Complaint in equity to obtain an accounting from the Petitioner under the provisions of the Agreement. Except for financial statements covering the periods from October 17, 1966 to December 31, 1966 and from January 1, 1967 to December 31, 1967, the Petitioner failed to supply Respondent with any information regarding the payments of net income to be made to Respondent. In addition, the Petitioner failed and refused to make any of the payments to Respondent required under the Agreement.

The Petitioner contends that it had no obligation to supply any additional information or to make any payments to Respondent after December 30, 1968. On that day the Internal

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Revenue Service ("IRS") conducted an "administrative sale" of certain assets of the Pittsburgh Liquidating Corporation including the right of the Respondent to receive payments under the Agreement; the purchaser at the sale was the Petitioner. No application to conduct the sale by the IRS was made to the court which had appointed Respondent receiver of the Pittsburgh Liquidating Corporation. Furthermore, Respondent was not notified that the sale was to be held and it was not until more than two years thereafter that he learned of it.

Upon appeal to the Supreme Court of Pennsylvania the decree of the Court of Common Pleas of Allegheny County, Pennsylvania dismissing the Complaint was vacated. In his brief to the Supreme Court of Pennsylvania, Respondent challenged the validity of the IRS sale on several grounds including (i) the failure of the IRS to observe the notice requirements for seizure and sale of property, (ii) violation of the constitutional requirement of due process and (iii) the lack of authority of the IRS to sell the property because at the time of levy on, and sale of, such property it was in the exclusive possession and control of the Court of Common Pleas of Allegheny County, Pennsylvania and the Respondent by virtue of the prior appointment of Respondent as receiver of the Pittsburgh Liquidating Corporation. Although the

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only issue presently before this Court involves the notice of seizure required to be given pursuant to Section 6335 of the Internal Revenue Code, Respondent hereby preserves all other issues presented to the Supreme Court of Pennsylvania.

ARGUMENT

- I. AN ADMINISTRATIVE TAX SALE OF A CONTRACT RIGHT TO RECEIVE PAYMENTS OF MONEY IS INVALID IF THE INTERNAL REVENUE SERVICE FAILS TO SERVE THE PERSON ENTITLED TO RECEIVE THE PAYMENTS WITH THE NOTICE OF SEIZURE REQUIRED BY SECTION 6335 OF THE INTERNAL REVENUE CODE.

The opinion of the Supreme Court of Pennsylvania should not be reviewed by this Court. In reaching its decision that Court recognized the critical distinction between a right to receive payment and an obligation to make payment, which interests are separate and distinct and are not equivalent. Petitioner fails to make such a distinction in its argument and such failure is the basic error in its Petition.

- a. The IRS Failed to Give Notice of Seizure to Respondent.

Before property may be validly sold by the IRS pursuant to an administrative sale certain statutory notices must be given. Section 6335 of the Internal Revenue Code of 1954 ("IRC"), 26 U.S.C.A. §6335, requires that two separate notices be given: (1) notice of seizure and (2) notice of sale. The notice provisions of Section 6335 are mandatory and unless there is strict compliance therewith a taxpayer's property may not be validly sold. Reece v. Scoggins, 506 F.2d 967 (5th Cir. 1975); U. S. v. Conry,

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74-1 USTC ¶9187 (N.D. Calif. 1973); Johnson v. Gartlan, 470 F.2d 1104 (4th Cir. 1973) cert. denied, 414 U.S. 865; Margiotta v. District Director of Internal Revenue, 214 F.2d 518 (2nd Cir. 1954).

Subsection 6335(a) of the IRC, 26 U.S.C.A. §6335(a), provides, in part, that:

NOTICE OF SEIZURE.--As soon as practicable after seizure of property, notice in writing shall be given by the Secretary or his delegate to the owner of the property (or, in the case of personal property, the possessor thereof)....

At the sale conducted on December 30, 1968, the IRS attempted to sell certain personal property of the Pittsburgh Liquidating Corporation. With respect to a seizure of personal property, subsection 6335(a) of the IRC requires that written notice be given to the owner of the property or to the possessor thereof. The notice of seizure involved in this case described three groups of assets including the following asset identified as item B:

That portion of the interest in said contract of October 15, 1966 [the Agreement] for the payment of one-half of the net profits by

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the New Pittsburgh Courier Publishing Company to the Pittsburgh Liquidating Corporation for a period of ten (10) years.

This asset which constituted a right to receive payments was obviously owned by the Pittsburgh Liquidating Corporation since it was part of the consideration to the Pittsburgh Liquidating Corporation under the Agreement for the transfer of property to Publishers Service and since it had never been conveyed by the Pittsburgh Liquidating Corporation or Respondent.

In properly applying the law to the facts in this case, the Supreme Court of Pennsylvania held that Respondent possessed item B. From and after his appointment as receiver, which occurred approximately one and one-half years before the notice of seizure was served, item B was in Respondent's possession and all persons were enjoined from taking possession of any assets of the Pittsburgh Liquidating Corporation, including item B. The Petitioner never possessed item B; in fact, the Petitioner was obligated to make the payments described in item B, not to receive them. Consequently, for the notice of seizure to be effective as to item B, it had to be given to the Pittsburgh Liquidating Corporation or Respondent; neither the Pittsburgh Liquidating Corporation nor Respondent however was given such notice.

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b. Under The Applicable Law Respondent Possessed Item B.

In its argument Petitioner quotes from the opinion of this Court in the case of Aquilino v. United States, 363 U.S. 509 (1960) to challenge the use of that case by the Supreme Court of Pennsylvania as authority for applying Pennsylvania law in determining that item B was possessed by Respondent. Petitioner, however, not only used the quote out of context but also failed to complete the remainder of the sentence from which the quoted material was taken. The balance of the sentence as well as the remainder of the paragraph from which it was taken confirms that state law determines the nature of property interests and that once such interests are determined federal law is then to be applied to determine the priority of liens asserted against such property interests; in the instant case there is no issue as to priority of liens.

However, once the tax lien has attached to the taxpayer's state-created interests, we enter the province of federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayer's "property" or "rights to property". [Footnotes omitted. Underscored material designates balance of sentence omitted by Petitioner]. 363 U.S. at 513-14.

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The Supreme Court of Pennsylvania held that under the law of Pennsylvania the contract right to receive payments is possessed by the obligee (Respondent), not the obligor (Petitioner).

II. THE NOTICE PROVISIONS OF SECTION 6335 OF THE INTERNAL REVENUE CODE ARE MANDATORY.

Despite Petitioner's argument to the contrary, the notice provisions of Section 6335 of the IRC are mandatory and require strict compliance; there is no conflict among the Circuit Courts of Appeal as to this point. The court's opinion in Johnson v. Gartlan, 470 F.2d 1104 (5th Cir. 1973) recognizes the general rule that strict compliance is required to validate tax sale; the Fourth Circuit nevertheless held the tax sale valid in the Johnson case notwithstanding the failure of the IRS to strictly comply with the notice requirements because the taxpayer subsequently ratified the sale. 470 F.2d at 1104 and 1106.

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III. RESPONDENT DOES HAVE A REMEDY AGAINST PETITIONER FOR THE WRONGFUL SALE PURSUANT TO AN INVALID ADMINISTRATIVE TAX SALE OF THE CONTRACT RIGHT TO RECEIVE PAYMENTS.

Petitioner would deny to Respondent the right to recover the loss sustained as a result of the wrongful sale of item B. Such a position has no support in law. The action instituted by Respondent was commenced in a state court to obtain an accounting of amounts due him under the Agreement and to recover such amounts; as one defense Petitioner asserted that as a result of the administrative tax sale conducted by the IRS it owned the right under the Agreement to receive payments of fifty (50%) percent of the net profits generated by it. Such a suit is properly before the state court being a conventional action brought on a contract.

In Margiotta v. District Director of Internal Revenue, 214 F.2d 518 (2nd Cir. 1954) the court invalidated a tax sale because the IRS failed to strictly adhere to the notice requirements and permitted the recovery of personal property sold from a person who had paid the purchase price therefor and to whom

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possession of the property had been transferred. The Second Circuit held that the certificate of sale issued by the IRS for the personal property sold by it is not conclusive evidence of the validity of the sale and has no effect if it is shown (as it was in the present case) that the IRS failed to observe the notice requirements.

Reece v. Scoggins, 506 F.2d 967 (5th Cir. 1975), affirms the principles of Margiotta and permitted the recovery by the taxpayer of property sold at an invalid sale. In Reece, the sale of the taxpayer's property was vacated and the Fifth Circuit, after noting the existence of a citizen's right to property "free from arbitrary governmental interference", stated at page 971:

In recognition of the Damoclean nature of this ultimate weapon [the power to summarily seize and sell a taxpayer's property], Congress has imposed precise strictures on the seizure and sale of property to satisfy legitimate tax deficiencies. The §6335 notice requirements are designed to protect the taxpayer by giving him an opportunity to be present at the tax sale and bid on the property.... The language of

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this section is clear and mandatory; absent literal compliance with its provisions, the government sale of land cannot stand.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. The Supreme Court of Pennsylvania properly held that Respondent's property was wrongfully sold without due process pursuant to an invalid administrative tax sale conducted by the IRS without compliance with the mandatory notice requirement of the IRC.

Respectfully submitted,

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